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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5847

HARRELL ALEXANDER, SR., PETITIONER,

v.

GARDNER-DENVER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMARY OF RELEVANT DOCKET ENTRIES

Date	Court	Item Filed
August 25, 1970	U.S. District Court For The District of Colorado (hereafter District Court)	Complaint
November 17, 1970	District Court	Answer
January 29, 1971	District Court	Deposition of Harrell Alexander
February 12, 1971	District Court	Motion for Summary Judgment Filed
February 12, 1971	District Court	Request for Admission
March 25, 1971	District Court	Response to Defendant's Request for Admissions

July 7, 1971	District Court	Memorandum Opinion and Order
July 16, 1971	District Court	Judgment Entered
August 5, 1971	District Court	Notice of Appeal
November 17, 1971	U. S. Court of Appeals Tenth Circuit	Stipulation
August 11, 1972	U. S. Court of Appeals Tenth Circuit	Opinion and Order Affirming District Court
August 11, 1972	U. S. Court of Appeals Tenth Circuit	Judgment
November 2, 1972	U. S. Supreme Court	Motion for Extension of Time to File Petition for Certiorari
November 8, 1972	U. S. Supreme Court	Order of Justice White Granting Extension Until December 8, 1972
December 8, 1972	U. S. Supreme Court	Motion to Proceed in Forma Pauperis and Petition for Certiorari Filed
January 5, 1973	U. S. Supreme Court	Brief in Opposition to Petition for Certiorari Filed
February 20, 1973	U. S. Supreme Court	Motion to Proceed in Forma Pauperis and Petition for Certiorari Granted

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. C-2476

HARRELL ALEXANDER, SR., PLAINTIFF,

vs.

GARDNER-DENVER COMPANY, A Delaware corporation, DEFENDANT.

Complaint

COME Now the plaintiff by and through his attorney, Philip M. Jones, and for the Complaint against the defendant states and alleges as follows:

1. That jurisdiction of this Court is invoked pursuant to 28 USC § 1343 and 42 USC § 2000 et. seq. and more specifically 42 USC § 2000 e-5.

2. That the acts hereinafter complained of occurred in the State and District of Colorado.

3. That the plaintiff is a citizen and resident of the City of Denver and State of Colorado.

4. That the plaintiff has performed all conditions precedent to the bringing of this action.

5. That at all times pertinent herein, the defendant is and was engaged in interstate commerce, and is and was doing business in the State of Colorado.

6. That the defendant is and was at all times pertinent herein an employer under the meaning of 42 USC, § 2000e.

7. That the plaintiff is a person as defined by 42 USC § 2000e and as such is entitled to institute this action.

8. That the plaintiff was employed by the defendant in May, 1966, and assigned to the Yard Department.

9. That on June 11, 1968, plaintiff bid on and was awarded a position as a drill operator trainee.

10. That the plaintiff was discharged by the defendant on September 29, 1969.

11. That the plaintiff was satisfactorily performing his tasks at the time of his discharge and in fact was discharged because he was of the Negro Race, in violation of 42 United States Code, § 2000e et. seq. and more specifically § 2000e-2(a)(1) to wit:

"(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ."

12. That the plaintiff filed a charge, in writing and under oath with the Equal Employment Opportunity Commission (EEOC).

13. That pursuant to 29 CFR § 1601.25(a) a Notice of Right to Sue was issued by the EEOC.

14. That as a result of the unlawful employment practices of the defendant as heretofore set forth, the plaintiff has incurred damages as follows:

a. Loss of earnings since on or about September 29, 1969, in the estimated amount of $5,720.00, the precise amount can be determined by the records and information in the possession of the defendant.

b. Loss of seniority benefits in an amount yet to be determined which can be determined by the records and information in the possession of the defendant.

c. Loss of retirement benefits in an amount yet to be determined which can be determined by the records and information in the possession of the defendant.

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

1. A permanent injunction against the defendant enjoining said defendant from engaging in or repeating its unlawful employment practices toward plaintiff or any other member of the Negro race.

2. Damages in the approximate amount of $5,720.00 which sum would have been earned by the plaintiff if the defendant had not engaged in unlawful employment practices toward him, and for such additional damages as plaintiff may have sustained for loss of seniority benefits and retirement benefits; all such damages to be more specifically proved at trial from information and records now in the possession of the defendant.

3. Interest, costs, including reasonable attorney's fees and expert witness fees to be taxed as part of the costs of this action.

4. For such further relief as to the Court seems just and proper.

Respectfully Submitted,

By: Philip M. Jones
Parkview Professional Building
1839 York Street
Denver, Colorado 80206
Telephone: 399-6360

Address of Plaintiff:
3610 Fairfax Street
Denver, Colorado

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

ANSWER

COMES Now the defendant, Gardner-Denver Company, by its attorney, Robert G. Good, and for answer to the plaintiff's complaint, admits, denies and avers as follows:

FIRST DEFENSE

1. Defendant denies each and every allegation contained in paragraph I of plaintiff's Complaint.

2. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegation contained in paragraph II of plaintiff's Complaint.

3. Defendant admits the allegations contained in paragraph III of plaintiff's Complaint.

4. Defendant denies each and every allegation contained in paragraph IV of plaintiff's Complaint.

5. Defendant admits the allegations contained in paragraph V of plaintiff's Complaint.

6. Defendant admits the allegations contained in paragraph VI of plaintiff's Complaint.

7. Defendant admits that part of allegation number VII of plaintiff's Complaint alleging that plaintiff is a person as defined by 42 U.S.C. Sec. 2000(e) and denies each and every other allegation contained in paragraph VII of the Complaint.

8. Defendant admits the allegations contained in paragraph VIII of plaintiff's Complaint.

9. Defendant admits the allegations contained in paragraph IX of plaintiff's Complaint.

10. Defendant admits the allegations contained in paragraph X of plaintiff's Complaint.

11. Defendant denies each and every allegation contained in paragraph XI of plaintiff's Complaint.

12. Defendant admits the allegations contained in paragraph XII of plaintiff's Complaint.

13. Defendant denies the allegations contained in paragraph XIII of plaintiff's Complaint.

14. Defendant denies each and every allegation contained in paragraph XIV of plaintiff's Complaint.

Second Defense

Plaintiff's Complaint fails to state a claim upon which any relief may be granted against the defendant.

Third Defense

That portion of paragraph I of plaintiff's prayer clause seeking a permanent injunction enjoining the defendant on behalf of "any other member of the Negro race" is inappropriate, since said Complaint does not allege a class action within the meaning of Rule 23 of the Federal Rules of Civil Procedure.

Affirmative Defenses

Comes Now the defendant and for Affirmative Defenses avers as follows:

First Affirmative Defense

1. That this Court is without jurisdiction over the subject matter of this action because the following conditions precedent were not complied with prior to the issuance of the Equal Employment Opportunity Commission's "Notice of Right to Sue Within 30 Days" and/or the plaintiff's commencement of the instant action:

a. The Equal Employment Opportunity Commission did not find "reasonable cause" as required by 42 U.S.C. Sec. 2000e-5.
b. The Equal Employment Opportunity Commission did not attempt to obtain voluntary compliance.
c. The plaintiff did not demand in writing that Notice of Right to Sue issue, as required by the Equal Employment Opportunity Commission's Procedural Regulations.
d. The plaintiff's Complaint was not timely filed within the meaning of 42 U.S.C. Sec. 2000e-5e.
e. That the failure of plaintiff to meet the requirements of (a) or (b) or (c) or (d) above deprives this Court of jurisdiction.

SECOND AFFIRMATIVE DEFENSE

1. The defendant incorporates by reference herein paragraphs 1 of the First Affirmative Defense.

2. That the plaintiff's failure to satisfy each and every procedural prerequisite deprives the plaintiff of standing to maintain the instant action.

THIRD AFFIRMATIVE DEFENSE

1. That the plaintiff was discharged for just cause on or about September 29, 1969.

2. That pursuant to a collective bargaining contract in effect between the defendant and the United Steelworkers of America, local Union No. 3029, the plaintiff filed a grievance on or about October 1, 1969, alleging that he was "unjustly discharged."

3. That pursuant to said collective bargaining agreement an arbitration hearing was held on November 20, 1969, before Mr. Don W. Sears, an impartial arbitrator.

4. That said arbitrator's award issued on December 30, 1969, dismissed plaintiff's grievance and ruled that plaintiff "was discharged for just cause."

5. That said arbitration award has the effect of a fiinal judgment within the meaning of the Federal Arbitration Act, 9 U.S.C. Sec. 9, 10 and 11.

6. That said arbitration award is binding upon the plaintiff and precludes the plaintiff from maintaining the instant action under Title VII of the Civil Rights Act of 1964.

7. That a refusal to give the arbitration award binding effect would be inequitable to the defendant and would seriously undermine the operation of the grievance and arbitration procedure.

FOURTH AFFIRMATIVE DEFENSE

1. That on or about November 5, 1969, the plaintiff filed a charge with the Equal Employment Opportunity Commission.

2. That said charge alleged that the defendant, Gardner-Denver Company, discharged plaintiff because of his race, in violation of 42 U.S.C. Sec. 2000e et seq.

3. That on or about July 1, 1970, the Equal Employment

Opportunity Commission issued a decision which stated that "reasonable cause does not exist to believe that Respondent engaged in unlawful practices in violation of Title VII of the Civil Rights Act of 1964."

4. That said Equal Employment Opportunity Commission decision precludes the plaintiff from maintaining the instant action.

FIFTH AFFIRMATIVE DEFENSE

1. The defendant incorporates by reference herein paragraphs 1, 2, 3, 4, 5, 6 and 7 of the Third Affirmative Defense and paragraphs 1, 2, 3 and 4 of the Fourth Affirmative Defense.

2. That as the result of the arbitrator's award and the Equal Employment Opportunity Commission's decision that plaintiff was discharged for just cause, the plaintiff is estopped from maintaining the instant action.

WHEREFORE, defendant prays that the Complaint be dismissed in its entirety and for costs, expert witness fees, and such other and further relief as the Court deems proper.

/s/ Robert G. Good
Attorney for Defendant
917 American National Bank Bldg.
Denver, Colorado 80202 222-7956

Address of Defendant:
1727 East 39th Avenue
Denver, Colorado 80205

[Certificate of Mailing Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

DEPOSITION OF HARRELL ALEXANDER, SR. (Taken by Defendant)

* * *

HARRELL ALEXANDER, SR., the Plaintiff herein, being first duly sworn, was examined and testified on his oath as follows:

* * *

[64] Q. Now, when you were suspended subject to discharge, you did file a grievance on that, did you not?

A. Yes, we did.

Q. And I believe your first hearing started at Step 2, did it not.

A. First hearing started at Step 1, which is at the time we filed the grievance with the local union steward. Then the next step was setting up to meet with the supervisors.

Q. And then you did meet with the supervisors?

A. Yes.

Q. What step was that?

A. Step 2.

Q. What supervisors were at that meeting?

A. I believe to my knowledge Mr. Schumacher.

Q. The general superintendent for Gardner-Denver?

A. Right.

Q. Who else was present at that meeting?

A. The local grievance man and myself and McFarlin.

[65] Q. The grievance man was Earl Comb?

A. Yes.

Q. And McFarlin?

A. Right.

Q. And yourself?

A. Right.

Q. Now, am I correct at that Step No. 2 you did state that you thought you were being discriminated against and that the scrap wasn't excessive?

A. I don't think a statement of discrimination was made at that time.

Q. Which step was discrimination mentioned?

A. None of the union steps. I filed with the Commission.

Q. The arbitration?

A. No. I made mention there when I wrote the letter.

Q. At the arbitration?

A. Prior to that. It was to the United Steel man that I wrote the first letter to.

Q. United Steel Workers Union?

A. Yes.

Q. You wrote a letter to them?

A. Right.

Q. When was that?

A. That was around about October—I don't have the [66] date. It was October of '69. It was after these first two steps had taken place. Must have been in the neighborhood of the 6th or 8th. Somewhere in there.

Q. Did you retain a copy of that letter?

THE WITNESS: Do you have a copy of that?

MR. JONES: It was written in October of '69?

THE WITNESS: Yes. Letter where it was all—with the valuable discovery that I made, and being the target of discrimination.

MR. JONES: I have got a copy of it.

MR. GOOD: Maybe we already have it.

Off the record.

(A discussion was then had off the record.)

MR. GOOD: Back on the record.

Q. (By Mr. Good) Your letter of October 10th to the United States Steel Workers, Mr. Alexander, did you draft that letter or did someone else?

A. No, I did along with the assistance of my pastor at the time.

Q. What was his name?

A. Reverend A. L. Scott.

Q. Didn't Mr. Scott appear at Step 4 of the grievance as your attorney?

A. No, he did not. Not as my attorney. Lawyer and a minister are somewhat different, I believe.

[67] Q. Did he appear at some step in the grievance?

A. He was down with me, yes. We met at the United States Steel office.

Q. And discrimination on the basis of race was raised in that step, wasn't it?

A. Yes.

Q. And what position did the company take?

A. I don't know. It was presented to the United States Steel man. He was a local man of this grievance committee at the time. He was over all of them. So I don't know what step he followed up on.

Q. Now, at the arbitration, who represented you there?

A. The United States Steel Workers went along with Mr. Baunhover, the union president.

Q. Bert?

A. Bert was the union man. He was there. Along with the president of the union.

Q. Now, at the arbitration, who was it that raised the issue of race?

A. Mr. Bert.

Q. How did he raise that?

A. By the letter that I wrote to him, explaining my position and what I had discovered.

Q. And subsequently the arbitrator, who was Mr. Don Sears—do you remember that name?

[68] A. Yes.

Q. He ruled that you were justly discharged; correct?

A. He stated something of that nature, along with some other suggestions that he made. I am sure you have a copy of it.

Q. And he did not conclude that you were discharged because you were black; correct?

A. No, he went according to the testimony that he had heard from the union, and they had time to prearrange their testimony and their charges against me, which I was inadequate in representing myself, and I should have had the right of representation from the union, which I did not receive at that time, in order to cope with what they had.

Q. The union did on your behalf allege you were fired discriminatorily; correct?

A. They read the statement I had sent to them, and they knew it was somethng to that effect.

Q. Yes, they did read verbatim your letter of October 10th?

A. Yeah, along with Mr. Bert. They rearranged it. It weakened it down. The original letter I wrote—he said discrimination was a big charge and has to be proven and have to have witnesses and all this.

Q. Did you provide any witnesses at the arbitration or any evidence of—

[69] A. I was not informed to have any. This is why I said without adequate representation from the union I was let down.

Q. Did you testify at the arbitration?

A. Yes.

Q. And you did—wasn't it—what did you have in support of your testimony that you were fired because you were black?

A. Well, I didn't have any support other than the conversation and knowledge—a man was a journeyman machinist, and he was qualified on the function of the drill, and he got up and drew an illustration on the board, and they had a piece of junk in there as scrap, saying they couldn't possibly drill a hole at that angle from this position. So they outweighed me on their theories.

Q. You felt that although the union raised the race issue at the arbitration they were really trying to water it down?

A. Yeah, I know they were.

Q. And when you took the stand did you try and water down the race issue, also?

A. No, I didn't. I held it up and at that time I told them that I had already filed with the City Commission because I could not rely on the union. All Caucasians. Don't have a black representative in there.

Q. When you say 'filed with the City,'' you mean the [70] Colorado Civil Rights Commission?

A. Yes.

Q. You say the union was all Caucasian. Isn't it true at one time you asked your shop steward, union steward, Mr. Combs, if the union had a civil rights committee? Do you recall asking him that and he responded that they did, and then you asked him what was the color makeup of that committee and he responded that there were several Negroes on that committee?

A. There was a Negro.

Q. One Negro?

A. Yes, but they don't get in the grievances. They handle disputes in other areas. They are never called in on a grievance.

Q. Did you feel that—well, who else was at the arbitration? Mr. Dean Schroeder, the personnel manager, was there; correct?

A. Yes.

Q. Did you feel Mr. Schroeder was discriminating against you?

A. To a certain extent.

Q. To what extent?

A. That he wouldn't consider my return back to the other department.

Q. You think he did that because you were black?

[71] A. I cannot answer that. I don't know.

Q. Did you feel the arbitrator was—was the arbitrator white or black?

A. You know Mr. Sears personally. He's Caucasian.

Q. We have to establish things for the record, and that's why I have to ask you some obvious questions.

Did you feel Mr. Sears discriminated against you because of your color?

A. Because he's an arbitrator he's a man to listen to sides, but as an arbitrator for myself, I never would have chosen him because he pointed out that he did not know anything about drills, didn't know anything about the function of drilling holes. So how can a man say who's right and who's wrong if he's going to arbitrate on a certain incident? He made it clear in the session that he did not know anything about hand drills nor the function of hand drills.

Q. And so when the arbitrator's decision came down, you received a copy of it, did you?

A. Yes, I did.

Q. Did you disagree with his findings?

A. Yes.

Q. And, nevertheless, you felt he was wrong in not finding that you were fired because you're black?

A. Would you rephrase that now?

Q. That was a little sloppy.

[72] Even after you read the arbitrator's decision, or after you read the arbitrator's decision, you felt that the arbitrator was wrong in not finding that you were fired because you were black?

A. Not necessarily because I was black, but because it was unjust in his thinking because that night after we left the committee meeting—that night I was assured by Mr. Bert that he knew the arbitrator personally and from what he could gather that it would be favorable in my behalf. And after I received the response of his conclusion, then

I was somewhat let down because I had been assured this verbally, that everything was going in my favor and that no doubt they would consider getting my job back and returning to work.

Q. Do you feel that if it were a white man at that arbitration instead of yourself who had the same record you had, that that man would have been put back to work?

A. To my knowledge I don't believe he would have even reached that far. He would have been put back to work earlier because it had happened—people have taken off two or three weeks at a time without telling anybody and returned and got their job back.

Q. Can you give me any names?

A. No, I cannot. It's on the records. You can request to see their records. What I am actually saying is it would never have gone that far—I don't know any other

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Title Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT

COMES NOW the defendant, Gardner-Denver Company, by its attorney, Robert G. Good, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure and respectfully moves this Court to grant summary judgment in favor of the defendant.

AND AS GROUNDS THEREFOR defendant asserts as follows:

1. That the plaintiff's Complaint was not timely filed as required by 42 U.S.C.A. Sec. 2000e-5e.

2. That the Equal Employment Opportunity Commission held that "reasonable cause does not exist to believe that Respondent engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964." Said decision of the Equal Employment Opportunity Commission is determinative of the plaintiff's rights and precludes the plaintiff from maintaining the instant Title VII action.

3. That before an impartial arbitrator the plaintiff alleged that his discharge was unjust and discriminatory. That the arbitrator's ruling that "plaintiff was discharged for cause" is binding on the plaintiff and precludes the plaintiff from maintaining the instant Title VII action.

The defendant directs this Court's attention to the attached Brief in Support of Motion for Summary Judgment.

WHEREFORE, defendant prays this Court to grant defendant's Motion for Summary Judgment.

Respectfully submitted,

/s/ Robert G. Good
Attorney for Defendant
915 American National Bank Building
Denver, Colorado 80202
222-7956

Address of Defendant:
1727 East 39th Avenue
Denver, Colorado 80205

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[EXHIBIT]

IN THE MATTER OF AN ARBITRATION Between GARDNER-DENVER COMPANY -and- UNITED STEELWORKERS OF AMERICA, LOCAL UNION No. 3029	Grievance involving the discharge of Harrell Alexander, Sr. AWARD OF THE ARBITRATOR December 30, 1969

This matter came on for hearing in Conference Room 8 of the Mountain States Employers Council at 1:30 p.m. on November 20, 1969, before a single arbitrator, Don W. Sears, appointed pursuant to the provisions of Article 23, Section 5, Step 5 of the collective bargaining agreement in effect between the parties at the time the instant grievance arose. This agreement will be referred to hereafter as the Contract.

Gardner-Denver Company, hereafter referred to as the Company, was represented by Mr. Philip R. Moore. United Steelworkers of America, Local Union No. 3029, hereafter referred to as the Union, was represented by Mr. A. J. Frantz.

WITNESSES

For the Company:	Oscar McFarlin, *Assistant Foreman Night Shift* Henry A. Stanley, *Assistant Foreman*
For the Union:	Clyde E. Zietz, *Area Grievance Man* Harrell Alexander, Sr., *Grievant* Earl Colm, *Area Grievance Man* Cletus Baumhover, *President and Chairman, Grievance Committee*

THE ISSUE

Did the Company discharge the grievant for just cause?

BACKGROUND OF THE GRIEVANCE

The grievant, Harrell Alexander, Sr., was employed by the Company in May, 1966. He was assigned to work in the Yard Department. On June 11, 1968, he bid into and was awarded a job as trainee in the Drill Department. He operated Machine No. 793. The training period for this job is twelve months. He was actually on this job fifteen and one-half months before being discharged but he lacked two weeks of completing the twelve month training period, having twice been held back and not given raises to the next labor grade.

On July 18, 1968, the grievant ran 33 parts, of which on 17 of the parts the .1865/.1885 diameter hole was excessively oversized. These 17 parts had to be scrapped. Mr. McFarlin ascertained that the grievant had not checked each part as required by the time study sheet. A warning notice was issued to the grievant. Company Exhibit A.

Mr. McFarlin talked to Clyde Zietz, Area Grievance Man, about the incident and also talked to the General Foreman. Mr. McFarlin then decided to intensify the grievant's training. He spent approximately 80 hours with the grievant demonstrating procedures and details step by step. The testimony indicated that the grievant's work performance improved somewhat after this intensive training and he consulted with Mr. McFarlin concerning his work problems until he received his second warning notice from Mr. McFarlin on May 15, 1969. This notice read as follows:

> "Your scrap as of lately has been terrific. I feel that this is due to carelessness on your part. During the month of April, 1969, you ran 13 pcs of scrap. On 4-30-69 you were drilling S48F-17FB, Oper 6 Lot # 1457. Six of these parts are scrap due to your carelessness. Due to the fact that you neglected to check your work allowing these six parts to go through as good parts when the 3/16" drill broke out."

The grievant then received a two-day suspension on June 5, 1969, for faulty workmanship. Company Exhibit B. Mr. McFarlin testified that several other employees had been suspended for excessive scrap and their work had subsequently improved. Mr. McFarlin said that the grievant's work did not improve after his suspension.

On the night of September 24 or 25, 1969, the grievant

was running a cylinder S-331. He was to drill a vertical hole 1 11/16" in depth. There was testimony that he was spotting the hole and trying to realign the drill in an attempt to get a straight hole. He was not following normal procedure in this regard. On September 30, 1969, he was issued a suspension, subject to discharge, by Mr. McFarlin. He was subsequently recommended for discharge due to defective work. The discharge became effective as of the end of the grievant's shift on Monday, September 29, 1969. See Union's Exhibit 3.

Mr. Henry Stanley, Assistant Foreman, testified that he was on duty on the night of September 24, 1969. He said there was nothing wrong with the grievant's machine on September 23. He said that two weeks before, two new bearings were put in the spindle but that they had nothing to do with the angle of the drill. He testified that the only thing that could cause the resulting angle was improper alignment and forcing the part.

The grievant told Mr. Stanley on the night of September 24, 1969, that the machine was noisy and vibrating and he didn't think it was doing the job. The machine maintenance man, when consulted by Mr. Stanley, said that he would not need a repair order because it only took him 30 seconds to tighten a nut, making the spindle easier to raise. Mr. Stanley testified that even if new bearings were improperly put into the machine, this would not cause the spindle to operate in a crooked fashion.

The instant grievance was filed on October 1, 1969. The parties were unable to resolve this matter at any of the steps in the grievance procedure provided in Article 23 of the Contract; hence they have submitted it to the Arbitrator for his decision on the merits.

Conclusions of the Arbitrator

First, the Arbitrator addresses himself to the question of which party has the burden of proof in establishing its case. Most arbitrators have accepted the view in disciplinary cases that the burden of proof rests upon the Company to show that the discipline was for just cause within the meaning of the Contract. As both parties well know, the Arbitrator accepts this view and has applied it in a long line of cases.

The Arbitrator has concluded that the Company has

proved that the discharge of the grievant was for just cause. If this discharge were found by the Arbitrator on the state of the evidence in this case to be without just cause, then the concept of corrective or progressive discipline as to less serious offenses, so favored by this Arbitrator and by others, would be dealt a severe blow indeed. See, for example, Huntington Chair Corp., 24 LA 490 (1955); Michigan Seamless Tube Co., 24 LA 132 (1955) and Niagara Frontier Transit System, 24 LA 783 (1955), discussed in Elkouri and Elkouri, How Arbitration Works (Revised Edition, 1960) at pp. 423 and 424. As Arbitrator Thompson stated in the latter case, "In industrial practice discipline is often 'progressive' or 'corrective' in nature. Warning is tried before suspension; suspension before discharge. Penalties are designed to correct if possible." (Underlining added for emphasis).

In this case, the grievant was dealt with most patiently. First, a warning notice followed by itensified training; next, another warning notice and oral discussions; then a two-day suspension without pay; and finally termination. Arbitrator Davey held in Sheller Mfg. Corp., 40 LA 890 (1963), that the employer there was justified in taking a similar series of disciplinary actions, culminating in discharge, against an employee for careless workmanship and poor performance. There was evidence in that case, as here, that the employee was told or shown how to do his job correctly on a number of occasions. The evidence also indicated that although he could perform the job correctly, as here he failed to correct his performance after repeated instructions, warnings and cumulative efforts at corrective discipline.

In its written statement presented at the Hearing, the Union challenged the written warning notice of July 18, 1968, the warning notice issued on May 15, 1969, and the two-day suspension of June 6 and June 9, 1969, introducing testimony at the Hearing designed to induce the Arbitrator to discount these various disciplinary actions. However, the Arbitrator is not free to do so. Those earlier disciplinary efforts have already been adjudicated and cannot now be reopened. If the Arbitrator were to reconsider them *de novo* in this proceeding, then non-grieved disciplinary proceedings would become chaotic and, in effect, meaningless when a grievance is later filed concerning a more strict disciplinary action.

The Arbitrator has concluded that the defective work performed by the grievant on the night of September 24 or 25, 1969, was not due to any malfunctioning of Machine #793. There was no probative evidence produced at the Hearing to demonstrate that the corrective maintenance done on the machine was incorrect or faulty or in any way contributed to the defective work produced by the grievant.

There is one matter remaining that troubles the Arbitrator. Mr. Cletus Baumhover, President of the Union, testified that when an employee has habitually run scrap, the Union has agreed to get the employee to transfer out of the department back to his former department when there is an opening. The Arbitrator has no way of knowing if this has been the practice or not. Certainly, this unsupported statement falls far short of proving a well-established past practice. On the other hand, there was no evidence at the Hearing to show that the grievant's performance in the Yard Department was unsatisfactory. All we have in the record is Mr. Schumacher's memorandum of October 2, 1969, to this effect. In this state of affairs, the Arbitrator simply cannot order the grievant to be transferred back to his former department when there is an opening. He *suggests,* nothing more, that the Company and the Union get together in an effort to ascertain if such an arrangement is feasible. However, the Arbitrator wants to make it abundantly clear that this suggestion forms no part of his decision, set out below, and the Company cannot be faulted or criticized by the Union if the Company concludes that such an arrangement is impractical. Had Mr. Baumhover testified as to numerous specific incidents where this kind of transfer had always been granted, the Arbitrator would feel differently.

Decision of the Arbitrator

It is the decision of the Arbitrator that the grievant was discharged for just cause. Consequently, his grievance is denied.

/s/ Don W. Sears, *Arbitrator*

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[EXHIBIT A TO STIPULATION]

COLLECTIVE BARGAINING AGREEMENT

* * *

ARTICLE 4

MANAGEMENT

The Union recognizes that all rights to manage the Plant, to determine the products to be manufactured, the methods of manufacturing or assembling, the scheduling of production, the control of raw materials, and to direct the working forces, including the right to hire, suspend or discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reasons, and the right to maintain order and efficiency are vested exclusively in the Company.

It is understood by the parties that all rights recognized in this Article are subject to the terms of this Agreement.

ARTICLE 5

MUTUAL RESPONSIBILITY

Section 1. The parties agree that during the term of this Agreement there shall be no strike, slow-down or other interruption of production, and that for the same period there shall be no lockout, subject to the provisions of Article 26, Term of Agreement.

Section 2. The Company and the Union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry. The Company further states and the Union approves that no such discrimination shall be practiced against any applicant for employment.

ARTICLE 6

RULES AND REGULATIONS

Section 1. The Company retains the right to establish and enforce shop rules and regulations. It is understood

that such rules and regulations will not impair or abridge the provisions of this Agreement. Violation of such rules and regulations may be cause for suspension or discharge.

Section 2. Rules and regulations governing employees covered by this Agreement shall be discussed with the Union prior to their effectiveness. Any disciplinary action, taken by the Company pursuant to such rules and regulations, may be made the subject of a grievance.

• • •

SECTION 13—MODIFICATION OF STANDARDS

These standards may be modified at any time by action of the Committee subject to approval by the signatory parties of the Apprenticeship Agreement.

ARTICLE 22

WAGES

Section 1. The job classifications and labor grades as set forth in the Job Evaluation Program are hereby made a part of this Agreement. New or changed jobs will be established in accordance with the Job Evaluation Program.

Section 2. The basic hourly rate of pay for each labor grade shall be as set forth in Appendix "A". Such basic hourly rates of pay shall remain in effect for the duration of the Agreement.

Section 3.

(a) If the National Consumer Price Index—All Cities (1957-1959=100), issued by the U.S. Department of Labor, Bureau of Labor Statistics (hereinafter referred to as the "Index), for the month of May, 1969, exceeds the level of the Index for the month of December, 1968 by 0.5 points or more, then, effective with the first pay period commencing on or after July 16, 1969, each employee will receive a supplemental wage payment equal to one cent (1¢) per hour for each full 0.5 point increase in the level of the Index for May, 1969 over that for December, 1968.

(b) If the Index for the month of May, 1970, exceeds the level of the Index for the month of December, 1969 by 0.4 points or more, then, effective with the first

pay period commencing on or after July 16, 1970, each employee will receive, in addition to any supplemental wage payment in effect under (a) of this Section, a supplemental wage payment equal to one cent (1¢) per hour for each full 0.4 point increase in the level of the Index for May, 1970, over that for December, 1969.

(c) The supplemental wage payments provided for in (a) and (b) of this Section will be paid as an add-on to each hour worked or paid for under this Agreement.

Article 23

ADJUSTMENT OF GRIEVANCES

Section 1. The Grievance Committee shall consist of five (5) employees designated by the Union who will be afforded such time off as may be required:

(1) To attend meetings scheduled between the Company and the Union.

(2) To handle necessary grievance matters within their jurisdiction, but only after first securing permission from their department foreman or supervisor, and then checking out. Notice must also be given to the head of the outside department to be visited.

Section 2. The Union may designate one Assistant Grievance Committeeman to each department, excepting in cases of smaller departments where one Assistant Grievance Committeeman may represent two or more, and in large departments, one for each twenty-five (25) employees, the same applying to each shift. Assistant Grievance Committeemen shall confine their grievance activities to matters arisiny in departments or department under their jurisdiction.

Section 3. The International Representative of the Union certified as such to the Company shall have access to the Plant for the purpose of adjusting a grievance, negotiating the settlement of disputes, investigating working conditions and generally for the purpose of carrying into effect the provisions and aims of this Agreement. Whenever possible, he shall make an appointment in advance for such visits. In any event, the Union Representative shall, on arrival at the Plant, clear through the regular channel of

the Company for receiving visitors, and may be accompanied by a representative of the Company on any visit to the plant.

Section 4. Should a meeting be necessary in the handling of grievances in Step 2 as set forth below, the Company shall call the area grievance committeeman, the assistant grievance committeeman, and the aggrieved employee. Witnesses may be called by joint agreement of the designated Company and Union Representative assigned to handle Step 2 of the grievance procedure. Employees called to such meetings shall be paid at their basic hourly rate or earned rate, whichever is higher, if meetings are called by the Company during working hours. Time spent by Union representatives in Steps 2 and 3 will not be counted in computing the earned rate but will be counted for the computation of overtime if such time spent occurs during the employee's normal work shift.

Section 5. Should differences arise between the Company and the Union as to the meaning and application of the provisions of this Agreement, or should any trouble arise in the plant, there shall be no suspension of work, but an earnest effort shall be made by both the Company and the Union to settle such differences promptly. Grievances must be presented within five (5) working days after the date of the occurrence giving rise to the grievance or they shall be considered waived. Grievances shall be taken up in the following manner; except that any grievance filed by the Local Union shall be submitted in writing at Step 3 of the grievance procedure as set forth herein:

Step 1. An attempt shall first be made by the employee with or without his assistant grievance committeeman (at the employee's option), and the employee's foreman to settle the grievance. The foreman shall submit his answer within one (1) working day and if the grievance is not settled, it shall be reduced to writing, signed by the employee and his assistant grievance committeeman, and the foreman shall submit his signed answer of such grievance.

Step 2. If the grievance is not settled in Step 1, it shall be presented to the Superintendent, or his representative, within two (2) working days after the Union has received the Foreman's answer in

Step 1. The Superintendent or his representative shall submit his signed answer two (2) working days after receiving the grievance.

Step 3. If the grievance is not settled in Step 2, it shall be presented to the manager of Manufacturing or his representative within five (5) working days after the Union has received the Superintendent's answer in Step 2. The Manager of Manufacturing or his representative shall meet with the representatives of the Union to attempt to resolve the grievance within five (5) working days following the presentation of the grievance. The Manager of Manufacturing or his representative shall submit his signed answer within three (3) working days after the date of such meeting.

Step 4. If the grievance is not settled in Step 3, it shall be referred to the Personnel Manager, and/or his representatives, and the International representative and chairman of the grievance committee within five (5) working days after the Union has received the Step 3 answer. Within ten (10) working days after the grievance has been referred to Step 4, the above mentioned parties shall meet for the purpose of discussing such grievance. Within five (5) working days following the meeting, the Company representatives shall submit their signed answer to the Union. The Union representatives shall signify their concurrence or non-concurrence and affix their signatures to the grievance.

Step 5. Grievances which have not been settled under the foregoing procedure may be referred to arbitration by notice in writing within ten (10) calendar days after the date of the Company's final answer in Step 4. Within five (5) days after receipt of referral to arbitration the parties shall select an impartial arbitrator.

Should the parties be unable to agree upon an arbitrator, the selection shall be made by the Senior Judge of the U. S. Circuit Court of Appeals for the Tenth Circuit. The decision of the arbitrator shall be final and binding upon the Company, the Union, and any employee or employees involved. The expenses and fee of the

arbitrator shall be divided equally between the Company and the Union. The arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement.

Section 6. (a) No employee will be discharged, suspended or given a written warning notice except for just cause.

(b) Before an employee is discharged, he will be suspended for five (5) working days pending final determination of discipline, and the Company will promptly notify the Chairman of the Grievance Committee in writing of such action. At the request of the Union, a hearing will be held, within three (3) working days after such notice to the Union, before the Plant Superintendent or his representative and the Chairman of the Grievance Committee or his representative. Either party shall have the right to call the aggrieved employee or employees and necessary witnesses. Prior to the close of the five (5) day suspension period, the Company will notify the Union in writing of its final determination of discipline; and the Union may, within three (3) working days after receipt of such notice, file a grievance in writing starting with Step 3 of the grievance procedure.

(c) In cases of suspension (other than suspension pending final determination of discipline as set forth in (b) above) or issuance of a written warning notice, the Company will promptly notify the Chairman of the Grievance Committee in writing of the action taken; and the Union may, within three (3) working days after receipt of such notice, file a grievance in writing starting with Step 2 of the grievance procedure.

(d) Failure to request a hearing or to file a grievance within the time limits set forth in (b) or (c) of this Section will automatically make the disciplinary action taken valid; provided, however, such time limits may be extended by mutual agreement of the Company and the Union.

(e) In any disciplinary proceeding, written warning notices more than two (2) years old will not be considered or submitted as evidence.

(f) If at any time prior to the issuance of an arbitrator's award in a discharge case, it is concluded by the Company that a discharge shall be converted into a suspension with-

out pay, and if this is agreed to by the Chairman of the Grievance Committee or his representative, such suspension shall remain effective for the time agreed upon.

(g) Should it be determined that the employee has been unjustly suspended or discharged the Company shall reinstate the employee and pay full compensation at the employee's basic hourly rate or earned rate, whichever is the higher, for the time lost.

Section 7. The time limits set forth in Section 5 of this Article may be extended by mutual agreement of the Company and the Union.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[EXHIBIT B TO STIPULATION]

October 10, 1969

UNITED STEEL WORKERS OF AMERICA

AFL-CIO

LOCAL #3029

AND TO WHOM IT MAY CONCERN:

On September 24, or there about, Mr. McFarlin the drill foreman being off and Mr. Standley serving his stead- I called his attention to the fact of my discovery of certain apparent irregualarities in machine #793.

The sound of the machine pointed out the fact that the machine was off precision and for that reason would fall short of the perfection expected by the company as well as the exactitude desired by me, the operator of the aforesaid machine.

On receiving this intelligence Mr. Standley called the M&M man, whose name I do not know yet I know him on sight, to inspect the machine and after doing so, he made certain adjustments, but refused to recommend shutting down the aforesaid machine. After which, Mr. Standley, my superior ordered me to continue production on this machine whose realiability I did not trust this I did otherwise my only alternative would have been to run the risk of becoming insubordinate in my relationship to my superior, but when this machine did not produce I was blamed instead of being credited with making a valuable discovery that would have prevented this subsequent unjust and biased indictment.

I am knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I, Harrell Alexander, have been the target of preferential discriminatory treatment.

In the fact of all this, it is known and understood by all that no trainee is given enough time for adequate training,

because the instructor have always had an over load of trainees.

In the light of these facts and within the frame work of the broadest and fairest interpretation of our working agreements, I have every right to *reinstate* in the same position without penalty.

/s/ Harrell Alexander Sr.
HARRELL ALEXANDER SR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[EXHIBIT C TO STIPULATION]

GRIEVANCE REPORT Exhibit 2

Grievance No: 68-85 Date: Oct. 1, 1969
Employee's Name: Harrell Alexander Clock No. 1426
Date and Time of Grievance: _____

STEP No. 1

Statement of Grievance:

I feel I have been unjustly discharged and ask that I be reinstated with full seniorty and pay.

Harrell Alexander Sr.
Employee

C. A. Baumhover
Committeeman

Decision of Foreman: _____

Grievance Committeeman Foreman
Date

COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-2476

HARRELL ALEXANDER,
PLAINTIFF,
vs.
GARDNER-DENVER COMPANY,
DEFENDANT.

Memorandum Opinion and Order

WINNER, *Judge*

Plaintiff's complaint charges a violation of Title VII of the Civil Rights Act. He says that he was discharged from his employment because "he was a member of the Negro race." After an arbitration held under a union contract (to be discussed later herein) he filed an appropriate complaint with the Equal Employment Opportunity Commission, and, on July 25, 1970, that Commission advised plaintiff that it found no probable cause for plaintiff's charge of discrimination. Enclosed with this advice was a form notifying plaintiff that he had 30 days within which to file suit in a United States District Court. On August 6, 1970, plaintiff filed in this Court, (1) an "Affidavit in support of Motion to Commence Action," and (2) a "Motion to Commence Action Without Payment of Fees and Costs." Acting on these ex parte documents, on August 6, 1970, Chief Judge Arraj entered an order permitting plaintiff to proceed in forma pauperis, appointing counsel for him and allowing 20 days within which to commence the action. The complaint in this Court was filed on August 25, 1970 [more than 30 days after the letter from the EEOC but within the 20 days allowed by the Court]. The case is now before the Court on defendant's summary judgment motion.

Defendant first asserts that the Court is without jurisdiction because the complaint was not filed within 30 days of the finding of lack of probable cause by the Equal Employment Opportunity Commission. Ordinarily, the 30-day time limit is jurisdictional, *Goodman v. City Products Corp.* (6 Cir.) 425 F. 2d 702; *Cunningham v. Litton Industries,*

(9 Cir.) 413 F. 2d 887. However, here the Court accepted the plaintiff's documents for filing, and allowed him 20 days within which to file a complaint. Under these circumstances, the Court believes that plaintiff has complied with the 30-day time limit and that defendant's jurisdictional attack on this ground must fail.

Defendant next says that the Court is without jurisdiction because the Commission did not find reasonable cause to believe that plaintiff's charge was true. This contention was disposed of by Judge Chilson in *Brown v. Frontier Airlines, Inc.*, (D.C. Colo.) 305 F. Supp. 827, and, "We agree and hold that a finding by the Commission, that there is reasonable cause to believe that the charge is true, is not a jurisdictional requirement for the maintenance of an action brought pursuant to Section 2000e-5(e), and that the finding by the Commission in this case that the facts do not constitute a violation of the Act does not deprive this Court of jurisdiction to judicially determine the plaintiff's claim."

With these preliminary questions disposed of, we come to the vital and troublesome issue in the case. Pursuant to the collective bargaining agreement between defendant and its employees, before filing his charges with the Equal Employment Opportunity Commission, plaintiff lodged a grievance under the labor contract. That grievance was arbitrated to Mr. Don W. Sears, the Dean of the University of Colorado Law School. After an evidentiary hearing the arbitrator made written findings and concluded, "that the grievant was discharged for just cause. Consequently, his grievance is denied." The arbitrator's findings do not discuss plaintiff's present assertion of racial discrimination, but Alexander's deposition taken in this case acknowledges that this charge was before the arbitrator, and, on this motion for summary judgment, that deposition has been considered by the Court.

The present posture of the case, then, is that the Commission did not find probable cause that plaintiff's charge of discrimination was true, and, with that same charge of racial discrimination before him, the Dean of the University of Colorado Law School, sitting as an arbitrator, found against plaintiff and found that he was discharged for just cause. We must decide just how many chances plaintiff should be afforded to try to establish his claim of discrimination. We have already held that his failure to

convince the Commission that there was probable cause for his charge does not bar a Title VII action in this Court, and we must now decide whether submitting the matter to arbitration under the labor contract requires the entry of a summary judgment in defendant's favor.

There are two diametric lines of authority. In *Culpepper v. Reynolds Metals Company* (1970) (5 Cir) 421 F. 2d 888, the employee filed a grievance under the union contract. He thereafter sought help from the Equal Employment Opportunity Commission, and the employer claimed that the short statute of limitations created by 42 U.S.C. 2000e-5 had run. The Court held that the statute was tolled by the union grievance procedure, and said:

> "Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.
>
> "This court has held many times that Title VII should receive a liberal construction while at all times bearing in mind that the central theme of Title VII is 'private settlement' as an effective end to employment discrimination. In Oatis v. Crown Zellerback (5 Cir., 1968) 398 F. 2d 496, this court held that:
>
> " 'It is thus clear that there is *great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation.*'
>
> "This view was again voiced in Jenkins v. United Gas Corporation (5 Cir., 1969) 400 F. 2d 28, where this court stated that:
>
> " '* * * EEOC whose function is to effectuate the *Act's policy of voluntary conference, persuasion and conciliation as the principal tools of enforcement.*'
>
> "It would, therefore, be an improper reading of the

purpose of Title VII if we were to construe the statute as did the district court to permit the short statute of limitations to penalize a common employee, who, at no time resting on his rights, attempts first in good faith to reach a private settlement without litigation in the elimination of what he believes to be an unfair, as well as an unlawful, practice. We therefore, hold that the statute of limitations, which has been held to be a jurisdictional requirement, is tolled once an employee invokes his contractual grievance remedies in a constructive effort to seek a 'private settlement of his complaint.' Culpepper also sought to settle his complaint in 1963 through the grievance procedures. We do not think that Congress intended for a result which would require an employee, thoroughly familiar with the rules of the shop, to proceed solely with his Title VII remedies for fear that he will waive these remedies if he follows the rules of the shop or to do both simultaneously, thereby frustrating the grievance procedure."

Hutchings v. United Industries, Inc. (1970) (5 Cir.) 428 F. 2d 303, rules squarely that as a matter of public policy the federal courts cannot be divested of jurisdiction of a Title VII action by any arbitration procedure under a labor contract. Judge Ainsworth there ably sets forth the arguments in support of this view, and he points out that in a Title VII suit, the individual "takes on the mantel of the sovereign." The Court held that "the matters in dispute were subject to the concurrent jurisdiction of the federal courts under the scheme of Title VII and of the grievance-arbitration machinery established by the bargaining contract." It was held:

"In view of the dissimilarities between the contract grievance-arbitration process and the judicial process under Title VII, it would be fallacious to assume that an employee utilizing the grievance-arbitration machinery under the contract and also seeking a Title VII remedy in court is attempting to enforce a single right in two forums. We do not mean to imply that employer obligations having their origin in Title VII are not to be incorporated into the arbitral process. When possible they should be. See generally Gould, Labor Arbitration of Grievances Involving Racial Dis-

crimination, 118 U. Pa. L. Rev. 40 (1969). But the arbitrator's determination under the contract has no effect upon the court's *power* to adjudicate a violation of Title VII rights.

". . . . .

"Title VII outlaws certain forms of discrimination in employment. An important method for the fulfillment of congressional purpose is the utilization of private grievance-arbitration procedures. This comports not only with the national labor policy favoring arbitration as the means for the final adjustment of labor disputes, e.g., Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199, but also with the specific enforcement policy of Title VII that discrimination is better curtailed through voluntary compliance with the Act than through Court orders. Congress, however, has made the federal judiciary, not the EEOC or the private arbitrator, the *final* arbiter of an individual's Title VII grievance. See Fekete v. United States Steel Corp., 3 Cir. 1970, 424 F. 2d 331. The EEOC serves to encourage and effect voluntary compliance with Title VII. So also may the private arbitrator serve consistent with the scope of his authority. Neither, however, has the power to make the ultimate determination of Title VII rights.

"In this case, we conclude that the District Court erred in holding that Hutchings was bound by the arbitrator's adverse determination regarding the October denial of a promotion and by settled 'third step' determination regarding the February denial. If the doctrine of election of remedies is applicable at all to Title VII cases, it applies only to the extent that the plaintiff is not entitled to duplicate relief in the private and public forums which would result in an unjust enrichment or windfall to him. Bowe v. Colgate-Palmolive Company, 7 Cir., 1969, 416 F. 2d 711. Hutchings, of course, has received nothing to date. Since this case involves Hutching's assertion of his Title VII rights, while the grievance and arbitration proceedings involved his assertion of contract rights, res judicata is inapplicable to this proceeding."

At the opposite pole is *Dewey v. Reynolds Metal Company*, (1970) (6 Cir.) 429 F. 2d 324. There Judge Weick, speaking for a divided Court said:

> "It is clear that if the arbitrator of the grievances had granted an award to Dewey, instead of to Reynolds, the award would have been final, binding and conclusive on Reynolds. Reynolds would not have been permitted to relitigate the award in the courts. This is the teaching of the United Steelworkers trilogy, which clearly defined the respective functions of the courts and the arbitrator. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 to 602, 80 S. Ct. 1343 to 1347, 4 L. Ed. 2d 1403 to 1408, 363 U.S. 574 to 592, 80 S. Ct. 1347 to 1358, 4 L. Ed. 2d 1409 to 1423, 363 U.S. 593 to 602, 80 S. Ct. 1358 to 1363, 4 L. Ed. 2d 1424 to 1431 (1960); Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C. D. Cal., 1968).
>
> "In *Steelworkers*, the Court said:
>
> > "'When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.' (Id. at 569, 80 S. Ct. at 1347)
>
> "The arbitrator had jurisdiction to determine the grievances. The arbitration involved an interpretation of the collective bargaining agreement with respect to Dewey's claims that he had been laid off and discharged because of his religious beliefs. In arbitration proceedings, frequently questions of law and fact are resolved by the arbitrator. Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.
>
> "This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining

agreements if they provide only a one-way street, i.e., that the awards are binding on them but not on their employees.

"The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration.

"In the supplemental brief of EEOC as amicus curiae, the case of Smith v. Evening News Ass'n, 371 U.S. 195, 197-198, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962), is cited for the proposition that 'the complainant is not required to elect between his contractual rights or his statutory rights but may seek to vindicate his claim in contractual and statutory proceedings.' (EEOC Supp. Brief, p. 3) The writer of the brief neglected to state that the collective bargaining agreement in *Evening News* contained no grievance arbitration procedure which had to be exhausted before recourse could be had to the courts. 371 U.S. 196, fn 1, 83 S. Ct. 267.

"The question in our case is not whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court *after* the grievance has been finally adjudicated by arbitration.

"We see no good analogy between jurisdiction of the National Labor Relations Board and that of EEOC. The Labor Board has adjudicatory powers over unfair labor practices, subject only to judicial review. Orders of the Board may be vacated on review only when they are not supported by substantial evidence upon consideration of the record as a whole. EEOC, on the other hand, has no such power. The District Court considers EEOC cases do novo. The legislative history, from which we have previously quoted, indicates the reason for the difference.

"Nor do we find any national policy for ousting arbitrators of jurisdiction to finally determine grievances initiated by employees, based on alleged violation of their civil rights."

On rehearing, Judge Combs, who had filed the dissenting

opinion, had resigned, and, with Judge McCree dissenting, Judge Weick added to his earlier opinion a discussion of *Culpepper, Hutchings, United Steel Workers Trilogy,* 363 U.S. 564, and *Boys Markets,* 398 U.S. 235. He there said:

"The case of Culpepper v. Reynolds Metals Co., 421 F. 2d 888 (5th Cir. 1970), is relied on in support of the proposition that an employee may utilize both arbitration and an action under Title VII of the Civil Rights Act. In Culpepper, however, only a grievance was filed, which was never processed through arbitration. *Culpepper* involved racial discrimination, which a majority of the panel thought was so serious as to impose—

"'* * * the duty on the courts to make sure that the Act works. * *'

"Circuit Judge Coleman, who filed a concurring opinion, disagreed rather vigorously that any such duty was imposed on the Courts. He stated:

"'Under our Constitutionally ordained form of Government, whether an Act works or fails is the concern of the Executive or Legislature, or both—not the courts.'

"We do not regard it as our function to enlarge on the plain language of a statute so as to impose on citizens obligations never intended by Congress, in order to make it work.

"Great reliance is placed upon Hutchings v. United Industries, Inc., 428 F. 2d 303 (5th Cir. 1970), which was decided after our decision in the present case was announced. In our opinion Hutchings does not comport with Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970).

"In *Boys Markets,* Mr. Justice Brennan emphasized the importance of arbitration in the settlement of labor disputes. He said:

"'However, we have frequently noted, in such cases as *Lincoln Mills,* [353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972] the *Steelworkers* [363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403] *Trilogy,* and *Lucas Flour*

[369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593] the importance which Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as a means to this end. Indeed, it has been stated that *Lincoln Mills*, in its exposition of § 301 (a), "went a long way towards making arbitration the central institution in the administration of collective bargaining contracts."

'The *Sinclair* [370 U.S. 195, 82 S. Ct. 1328, 8 L. Ed. 2d 440] decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices. Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking.' [footnote omitted.]

"Similarly, employers would be wary of arbitration clauses in collective bargaining agreements if, as in the present case, the arbitration is binding on them only and not on their employees.

"Our case is even stronger than *Boys Markets* because the grievance here was submitted to arbitration and the arbitrator made an award which was final, binding and conclusive on the parties. It is as binding as a judgment. 5 Am. Jur. 2d Arbitration and Award, § 147. It remains in full force and effect.

"The amicus brief of NAACP Legal Defense Fund candidly recognizes that '[i]t may be true that the result of such an accommodation will be that the employer but not the employee will be bound by the decision of the arbitrator.' (Brief, p. 14).

"We know of no good reason why an award of an arbitrator should not be binding on both parties, the same as a judgment of a court.

"It is difficult for us to believe that any employer would ever agree to arbitration of a grievance if he knew that the employee would not be bound by the result.

"The importance of arbitration in the resolution of all labor disputes is the theme of the United Steel Workers Trilogy, 363 U.S. 564-602, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960). The purpose of arbitration is thwarted if the awards are held by the courts to be binding on employers only and not on employees."

Certiorari was granted in *Dewey*, but on June 1, 1971, the Supreme Court announced an affirmance of the case by an equally divided Court with Justice Harlan not participating —U.S.—.[1]

Faced with this dichotomy of authority, we adopt in their entirety the views of Judge Weick expressed in *Dewey v. Reynolds Metals Company*, supra. We hold that when an employee voluntarily submits a claim of discrimination to arbitration under a union contract grievance procedure —a submission which is binding on the employer no matter what the result—the employee is bound by the arbitration award just as is the employer. We cannot accept a philosophy which gives the employee two strings to his bow when the employer has only one. Congress has given the employee one and one-half strings under the Equal Employment Opportunity procedure. It is true that the Commission can enter no order binding on the employer, but with a finding of probable cause, reserving to the employee the right to sue, he is given the assistance of an agency of the United States Government in attempting to bring about a settlement of the claimed discrimination. This amounts to a half string.

In *Boys Markets*, Justice Brennan stressed the important public policy of promoting private, peaceful settlement of disputes between labor and management. To hold that an employee has a right to an arbitration of a grievance which

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[1] Other cases emphasizing the divergent views of the Courts on this question are: *Bowie v. Colgate Palmolive Co.* (1969) (7 Cir.) 416 F. 2d 711; *Younger v. Glamorgan Pipe and Foundry Co.* (1969) (D.C.W.D. Va.) 310 F. Supp. 195; *McGriff v. A. O. Smith Corp.* (1971) (D.C. S.C.) 3 CCH-EPD ¶ 8124; *Voutsis v. Union Carbide Co.* (1971) (D.C. S.D. N.Y.) 321 F. Supp. 830; *Washington v. Aerojet General Corp.* (1968) (D.C.C.D. Calif.) 282 F. Supp. 517; *Fekete v. U.S. Steel Corp.* (1969) (D.C. W.D. Pa.) 300 F. Supp. 22); *Newman v. Avco Corp.* (1970) (D.C. M.D. Tenn.) 313 F. Supp. 1069; *Oubichon v. North American Rockwell Corp.* (1970) (D.C. C.D. Calif.) 3 CCH-EPD ¶ 8071, and cases cited in *Culpepper, Hutchings and Dewey.*

is binding on an employer but is not binding on the employee—a trial balloon for the employee, but a moon shot for the employer—would sound the death knell for arbitration clauses in labor contracts. Such a result would bring to a tragic end the many years of effort which have brought about the now prevailing arbitration procedures to resolve labor disputes. The vital importance of the rights protected by the Civil Rights Act must not be overlooked, but it is the employee who elected arbitration. His was a voluntary choice, and he should be bound by it. The Constitution and Title VII demand equality; neither requires preferential treatment of minorities. Chief Justice Burger's opinion in *Griggs v. Duke Power Co.*, (1971) 401 U. S. 424, can be read in no other way.

Defendant's motion for summary judgment is granted.

Dated at Denver, Colorado, this 1st day of July, 1971.

/s/ Fred M. Winner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

HARRELL ALEXANDER,
PLAINTIFF

vs.

GARDNER-DENVER COMPANY,
DEFENDANT

Civil Action No.
C-2476

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order signed by Judge Fred M. Winner on July 1, 1971, in the above entitled matter, and filed in this office on July 7, 1971.

IT IS HEREBY ORDERED that the action and complaint herein be and hereby are dismissed, and that the Defendant shall have and recover from the Plaintiff its costs, upon the filing of a Bill of Costs with the Clerk of this Court.

DATED AT DENVER, COLORADO, this 12th day of July, 1971.

G. WALTER BOWMAN, CLERK

/s/ James R. Manspeaker
JAMES R. MANSPEAKER
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY, 1972, TERM

HARRELL ALEXANDER, SR.,
PLAINTIFF-APPELLANT,

v.

GARDNER-DENVER COMPANY,
a Delaware Corporation,
DEFENDANT-APPELLEE.

No. 71-1548

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(District Court No. C-2476)

HENRY V. ELLWOOD, Denver, Colorado, for Plaintiff-Appellant.

ROBERT G. GOOD, Denver, Colorado, for Defendant-Appellee.

Before HILL and BARRETT, *United States Circuit Judges*, and LANGLEY, *United States District Judge*.

PER CURIAM.

This appeal is from the granting of defendant-appellee's motion for summary judgment, by the United States District Court for the District of Colorado, in a civil action filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., alleging racially motivated discriminatory employment practices by Gardner-Denver Company. Three grounds were advanced by Gardner-Denver in support of its motion. The first two bases challenged the timelinesss of plaintiff's filing suit, and the trial court's jurisdiction following a finding of the Equal Employment Opportunity Commission (EEOC) of no reasonable cause to believe that Gardner-Denver had engaged in unlawful employment practices. These were decided adversely to Gardner-Denver. The third proposition asserted that submission of the employment grievance to an impartial arbitrator precluded Alexander from maintaining a Title VII civil action and that the decision of the arbitrator was binding. This was decided adversely to Alexander and forms the basis of his appeal.

Harrell Alexander, a Negro, was employed by Gardner-Denver for over three years. He had advanced to a trainee's position in the drill department. He had been awarded this position on June 11, 1968, after having been employed for over two years by appellee, and had held this same position until he was discharged on September 29, 1969. The reason assigned was Alexander's poor performance as a drill press trainee, as evidenced by his accumulations of excessive amounts of scrap.

The collective bargaining agreement provided that an employee who believed Gardner-Denver had disregarded the labor agreement could lodge a protest within five days of the asserted breach. Alexander filed his grievance, and it was denied by Gardner-Denver. Further, pursuant to the Union Agreement provision for adjustment of grievances, the matter was submitted to arbitration. The arbitrator concluded the discharge was for just cause following a series of progressive industrial disciplinary practices. The issue of racially-motivated discriminatory employment practices was presented to the arbitrator and rejected.

Alexander had filed a formal complaint of racial discrimination with the Colorado Civil Rights Commission on October 27, 1967, prior to the arbitration hearing. That commission failed to act on the complaint, and Alexander filed a charge of discrimination with the EEOC. On July 24, 1970, the EEOC informed Alexander that the facts did not constitute a Title VII violation and dismissed the charge. The EEOC advised that a suit, if filed, must be commenced within 30 days. On August 6, 1970, the trial court permitted Alexander to proceed in forma pauperis, appointed counsel to represent him, and allowed 20 days in which to commence the action. The complaint was filed on August 25, 1970, beyond the 30-day period following the EEOC determination but within the 20-day period permitted by the court. The motion for summary judgment was filed on February 12, 1971, and granted by the trial court's memorandum opinion and order on July 7, 1971, on the ground previously discussed, that is, that the matter had been submitted to arbitration and the arbitrator's decision was binding on both parties.

The issue before us on appeal involves the correctness of the trial court's decision to uphold the decision of the arbitrator and to deny Alexander recourse of civil action in a federal district court following the adverse decision

by the arbitrator. We have examined the trial court's opinion and order in its disposition of the motion for summary judgment and find it exhaustive of the authorities and conclusive in resolution of the issue.

The judgment is therefore affirmed on the basis of the trial court's opinion and order, as reported.[1]

[1] Harrell Alexander, Sr. v. Gardner-Denver Co., —— F. Supp. —— (D.C. Colo. 1972).

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JULY TERM—AUGUST 11, 1972

Before HONORABLE DELMAS C. HILL and HONORABLE JAMES E. BARRETT, *Circuit Judges;* and HONORABLE EDWIN LANGLEY, *District Judge.*

HARRELL ALEXANDER, SR.,
PLAINTIFF-APPELLANT,

v.

GARDNER DENVER COMPANY,
a Delaware Corporation,
DEFENDANT-APPELLEE.

No. 71-1548

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed.

HOWARD K. PHILLIPS, *Clerk.*
By Helen R. Bartha
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

No. 72-5847

HARRELL ALEXANDER, SR., PETITIONER,

v.

GARDNER-DENVER COMPANY

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

FEBRUARY 20, 1973

☆ U.S. Government Printing Office: 1973—499-671/394